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CRIMINAL LAW

United States v. Adams, 914 F.2d 1404

Author: Judge Dumbauld, sitting by designation

Defendants, Adams and Eliga, appealed their convictions for possession with intent to distribute crack cocaine. The appeals were consolidated and the parties raised similar objections. Adams argued: (1) the defense and thus the jury were provided with insufficient information on the fact that the prosecution's chief witness was a police informant; (2) the district court improperly applied a minimum mandatory sentence pursuant to 214 U.S.C. § 851(b); (3) the district court improperly considered him a principal when he was an aider and abettor; and (4) he was less culpable and should have had his sentence adjusted downward. Eliga argued the first two points and also argued that a jury instruction improperly commented on his failure to testify.

The Tenth Circuit affirmed, finding that the jury had sufficient opportunity to uncover and consider the motives of the witness. Further, the court rejected all of Adams's sentencing arguments. The court ruled that the district court's sentencing complied with the mandatory minimums imposed by the 1986 and 1988 Anti-Drug Abuse Acts, which removed the district court's discretion. Finally, the court found no error with the contested instruction.

United States v. Armendariz, 922 F.2d 602

Author: Judge Moore

Defendants, Armendariz and Aguirre, were convicted after a jury trial of conspiracy to distribute marijuana. Aguirre was also convicted of use of a telephone to facilitate the conspiracy. Armendariz and Aguirre appealed, claiming they were denied a right to a fair trial. They claimed that the district court failed to grant a mistrial after a juror was contacted by the brother of one of the witnesses. They also claimed error in the district court's failure to suppress evidence of a wiretap. Finally, Aguirre alone claimed the district court abused its discretion in failing to deny Aguirre's motion for severance.

The Tenth Circuit affirmed the conviction. The court stated that when the presumption of impropriety in a third party contacting a juror has been rebutted, the burden is then on the defendant to show actual prejudice. No actual prejudice was shown. Therefore, Armendariz and Aguirre were not entitled to a mistrial. The court also found that under federal standards, probable cause existed to place the wiretaps. Accordingly, they were properly admitted into evidence. Finally, because the determination to grant severance lies in the broad discretion of the court, and no actual prejudice was shown, the district court did not abuse its discretion in not granting severance to Aguirre.

United States v. Bagster, 915 F.2d 607

Author: Judge McKay

Defendant, Bagster, was arrested by federal drug enforcement agents on February 19, 1987, and placed in a county jail. He posted a \$20,000 bond and was released by county jail officials the same day without the consent of federal officials. The next day federal officials filed a complaint against Bagster and obtained an arrest warrant. Bagster remained at large until June 12, 1987, when he was arrested on state drug charges in a different county. The United States Marshal eventually obtained custody of Bagster, and the federal grand jury returned an indictment on the federal drug charges on August 23, 1989. Bagster argued that the government failed to indict him within 30 days as required by § 3161(b) of the Speedy Trial Act, or, in the alternative, that his sixth amendment right to speedy trial was violated.

The Tenth Circuit held that a person is not arrested on a charge, and § 3161(b) is not triggered, unless a pending federal complaint coincides with federal custody based on that complaint. Four factors must be balanced to determine whether a defendant's right to speedy trial has been violated: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. Since the delay in this case was not caused by a lack of federal diligence and since it caused no prejudice to Bagster, the court found that the thirty-month period between Bagster's initial arrest and his indictment was not unreasonable.

Bailey v. Cowley, 914 F.2d 1438

Per Curiam

Plaintiff, Bailey, appealed the district court's denial of his petition for a writ of *habeas corpus*. Bailey alleged that his sentence was enhanced by two invalid convictions. Moreover, Bailey argued that his attorney rendered ineffective legal assistance by failing to investigate the invalidity of a 1971 conviction and by advising him to plead guilty in return for the prosecutor's promise to not use the conviction against him in a 1973 proceeding. Bailey also contended that his guilty plea was rendered involuntarily because he entered the plea under fear that the prosecution would use the conviction against him. Further, Bailey stated that the conviction was subsequently found unconstitutional.

The Tenth Circuit affirmed the district court's holding. The court concluded that Bailey's counsel in 1973 did not give ineffective legal counsel. Even though Bailey was tried as an adult in 1971 when he was only seventeen, Bailey failed to tell his 1971 counsel of his age. Further, the statute found to be unconstitutional in 1972 was valid in 1971. The subsequent determination that it was unconstitutional was not applied retroactively until 1974. Therefore, at the time of his attorney's advice in 1973, the conviction was neither void nor voidable. The court also determined that since the attorney's advice was effective legal assistance,

Bailey's reliance upon it did not render his plea involuntary. The court further concluded that the prosecution did not act improperly by using the conviction as a bargaining tool. Had Bailey gone to trial and been found guilty under the statute that subsequently was found to be unconstitutional, the use of the conviction as such a tool would be invalid. A conviction based on a guilty plea, however, will not be nullified by a subsequent change in the law.

Beachum v. Tansy, 903 F.2d 1321

Author: Judge Christensen, sitting by designation

Plaintiff, Beachum, a state prisoner, filed a petition for a writ of *habeas corpus*. He contended that his imprisonment for state crime convictions violated his rights to due process, a fair trial, equal protection, confrontation, and effective assistance of counsel. The district court denied Beachum's petition, and he subsequently appealed. Specifically, Beachum contended that: (1) the victim's testimony was hypnotically created, and this violated his rights to due process, a fair trial, and confrontation; (2) the government's comments in closing argument were so egregious as to deprive him of a fair trial; (3) his due process rights were violated when a doctor testified that the victim suffered severe emotional trauma when Beachum stared at her during the preliminary hearing; (4) he was denied effective assistance of counsel; (5) the district court erred in denying his right to counsel at the lineup and hypnosis session; and (6) his right to a representative jury and to equal protection were violated by the district court's *sua sponte* exclusion from the jury of the only black member.

First, the Tenth Circuit ruled that Beachum failed to establish by a preponderance of the evidence that any differences between the prehypnosis statements and her trial testimony were the product of hypnosis. Moreover, the victim's testimony was corroborated by physical and circumstantial evidence. Also, Beachum's right to confrontation was not abridged because the trial record showed no request from defense counsel to cross-examine the victim regarding hypnosis. Second, Beachum's rights were not impaired by the government's closing arguments. The court explained that there was some colorable basis for the prosecution's statements, and any related error would not be of constitutional significance. Third, the doctor made inappropriate remarks regarding the emotional trauma suffered by the victim. These remarks, however, did not deprive Beachum of a fair trial. The court reasoned that in a *habeas corpus* action, the significant inquiry is not whether the state court has properly applied the rules of evidence but whether an error of constitutional magnitude was committed. Fourth, Beachum was not denied effective assistance of counsel. The court explained that Beachum failed to show that his counsel's performance fell below objective standards of reasonableness. Moreover, he failed to prove that but for his counsel's unprofessional errors, the result of the proceeding would have been different. Fifth, Beachum was not denied his right to counsel at the lineup

and hypnosis session. The court reasoned that the right did not attach because at that time, there was no criminal prosecution and a critical stage had not been reached. Finally, Beachum's right to a representative jury and to equal protection were not violated. The court explained that the district court exercised its legitimate prerogative of judicial management. Also, the court had a neutral explanation for the dismissal. Further, the Constitution does not demand a representative jury, but only an impartial one.

United States v. Bedonie, 913 F.2d 782

Author: Judge Brorby

Defendants, Bedonie and Cly, appealed their convictions of first degree murder and related weapons charges. Bedonie and Cly were charged with killing two Navajo police officers and setting their vehicles on fire. Both presented alibis for the night the murders took place, but witnesses produced by the government testified to the contrary. On appeal, Bedonie alleged: (1) the district court lacked jurisdiction; and (2) he was deprived of his right to a unanimous verdict. Cly alleged, in addition to incorporating Bedonie's challenges, that: (1) the underrepresentation of Native Americans in the *venire* violated his sixth amendment rights; (2) the preemptory removal of the only Native American on the jury violated his fourteenth amendment rights; (3) the district court erred in denying "for cause" challenges of *venire* persons; (4) the district court abused its discretion by failing to exclude a government witness; and (5) the district court erroneously admitted evidence of his character.

The Tenth Circuit affirmed the decision of the district court. The court first stated that it had jurisdiction because pursuant to 18 U.S.C. § 81, the burning of or setting fire to a motor vehicle is a criminal act. Second, the court stated that Bedonie's unanimous verdict challenge failed for lack of evidence. Essentially, he failed to show any jury confusion or disagreement. Third, Cly's sixth amendment claim failed because he did not raise the objection at trial. Cly was also unable to produce evidence showing that a juror was removed solely because of her race, which is a prerequisite of a fourteenth amendment claim. Fifth, the district court did not abuse its discretion in denying Cly's challenges "for cause." Further, the court ruled that evidence relating to Cly's character was admissible under Fed. R. Evid. 608(a). Also, the prior inconsistent statements by witnesses did not disqualify them as incompetent.

United States v. Bolton, 905 F.2d 319

Author: Judge Kane, sitting by designation

Defendant, Bolton, was found guilty of receiving and possessing a firearm after being convicted of a felony and possessing an unregistered firearm. Bolton appealed, contending that the district court: (1) erred in refusing to disqualify the assistant prosecutor, who had represented

Bolton five years earlier; (2) violated the Speedy Trial Act by granting and excluding a continuance under the Act; (3) failed to give a jury instruction on the term "firearm"; (4) failed to rule that there was insufficient evidence to prove he possessed a firearm; (5) improperly enhanced his sentence because his prior convictions were simultaneously entered; and (6) prejudiced Bolton's rights with ineffective counsel.

The Tenth Circuit affirmed the decision of the district court. First, the court found that the district court did not abuse its discretion by allowing the assistant prosecutor to take part in the trial. The court reasoned that the prosecutor played a limited role in the prosecution. Moreover, there was no factual relationship between the two actions in which the prosecutor participated, and, therefore, no confidential information was relayed. Second, the Speedy Trial Act was not violated. The court reasoned that certain time periods are excluded under the Act, including continuances, if the granting of one outweighs the best interest of the public and the defendant in a speedy trial. Consequently, the district court properly excluded the continuances granted to Bolton because it was ordered to provide him with adequate counsel. Third, because there was no dispute that a shotgun is a firearm, a jury instruction was unnecessary. Furthermore, Bolton did not previously request such an instruction, and he never objected to the instructions given. Fourth, the jury had sufficient evidence to find that Bolton possessed a firearm. The court reasoned that there was enough evidence to find constructive possession. Bolton admitted that the shotgun was in his car, and he knew it was there. Also, the shotgun was in close physical proximity to him. Thus, Bolton knowingly held the power to exercise dominion and control over the shotgun. Fifth, Bolton's convictions on four prior robberies were sufficient to warrant enhancement of his sentence. Even though Bolton was convicted in a single judicial proceeding, the conviction was for multiple counts arising from separate criminal transactions. Thus, the court properly enhanced Bolton's sentence because his prior felonies were committed on occasions different from one another. Finally, Bolton failed to show that his counsel made errors so serious that his sixth amendment rights were violated.

United States v. Bowie, 892 F.2d 1494

Author: Judge Logan

Defendant, Bowie, was convicted of conspiracy to possess cocaine with intent to distribute and using a telephone to facilitate the conspiracy. Bowie challenged the conviction, arguing that: (1) the district court erred in denying his motion for judgment of acquittal at the close of the government's case; (2) the government improperly vouched for and bolstered the credibility of its witnesses; and (3) his sixth amendment right to effective assistance of counsel was denied because of a conflict of interest.

The Tenth Circuit vacated the decision of the district court and re-

manded the case for further proceedings. First, the court held that the government proved the existence of a conspiracy and Bowie's facilitation of it. Bowie's participation in the conspiracy was proven by: evidence that he distributed cocaine, evidence that he dealt in stolen property connected to the conspiracy, and evidence that he took title to houses purchased to deflect suspicion. Accordingly, the denial of his motion for acquittal was proper. Second, presenting evidence, such as a plea agreement, on a witness' obligation to testify truthfully is not improper vouching. Use of the "truthfulness" portions of a plea agreement becomes improper vouching only when prosecutors explicitly or implicitly indicate that they can monitor and verify the truthfulness of the witness' testimony. Last, the court remanded for a determination as to whether an actual conflict of interest adversely affected defense counsel's performance. The court explained that the record failed to state the precise scope of prior representation. Moreover, it failed to state whether a witness waived his attorney-client privilege which might have restricted defense counsel's cross-examination.

United States v. Brunson, 907 F.2d 117

Author: Judge Baldock

Defendant, Brunson, was convicted of committing armed robbery of a federally insured financial institution and sentenced to 262 months imprisonment. Brunson appealed both the conviction and the sentence. On appeal, Brunson argued: (1) the government failed to prove that the savings and loan institution was federally insured on the date of the robbery; and (2) the district court erred in classifying Brunson as a career offender because his two prior convictions were not crimes of violence.

The Tenth Circuit affirmed both the conviction and the sentence. The court held the circumstantial evidence produced at the trial was sufficient to sustain the jury's presumption that the institution was federally insured on the date of the robbery. The government introduced not only a certificate of insurance, but also two notices of current insurance premiums due and paid. The court also held that the sentence imposed was not in violation of the Sentencing Guidelines because Brunson's two prior convictions of burglarizing a dwelling were crimes of violence. The court explained that there was a "substantial risk" that force would be used in their commission. Therefore, the district court did not err in upgrading Brunson's classification to a career offender.

United States v. Bullock, 914 F.2d 1413

Author: Judge Seth

Defendant, Bullock, along with two co-defendants were charged with the manufacture and intent to distribute amphetamines. Bullock challenged two counts of the indictment: (1) that he knowingly and intentionally conspired to use or carry firearms in the commission of the crime; and (2) that he knowingly used or carried firearms "during the

commission" of the crime. Because the two counts did not use the exact language of the statute, Bullock claimed that they were fatally deficient. Further, Bullock argued that the 1984 amendment to § 924(c) created a "use" element making mere possession of a firearm insufficient for conviction.

The Tenth Circuit rejected Bullock's arguments, holding that the indictment was sufficiently descriptive to apprise Bullock of the offense charged. The court explained that an indictment need not quote the statutory language to be legally sufficient. Further, the court concluded that the two counts were stated in language equivalent to the statute, and that this was all that was required. In addition, the court held that the 1984 amendment did not create a new "use" element which must be specifically alleged. Instead, the amendment refined a factor already in the statute with no change to the original meaning.

United States v. Butler, 904 F.2d 1482

Author: Judge Tacha

Defendant, Butler, appealed his conviction for the possession of hashish. On appeal, Butler argued that the magistrate erred in: (1) overruling his motion to suppress; (2) failing to grant a mistrial for prosecutorial misconduct; (3) failing to require the government to provide Jencks Act material; and (4) giving a supplemental *Allen* instruction to the jury after deliberations had begun.

The Tenth Circuit ruled that the second search and seizure of Butler's property was reasonable on the basis that it followed a "controlled delivery." Essentially, the property was previously legally searched and seized and, therefore, the later search was not barred by the fourth amendment. Second, the court ruled that the magistrate's curative instructions to the jury coupled with his refusal to allow the witnesses to answer the prosecutor's improper questions were not an abuse of discretion. Third, the government's refusal to provide the Jencks Act material was harmless error because defense counsel was already in possession of the requested material. Finally, the court stated that the magistrate's supplemental *Allen* instruction was not coercive because it was given only after the jury was unable to reach a verdict.

Capps v. Sullivan, 921 F.2d 260

Author: Judge Logan

Plaintiff, Capps, a state prisoner, brought a petition for writ of *habeas corpus*, claiming that his constitutional rights were violated due to inadequate representation at trial. Capps's attorney pursued a jury nullification strategy rather than submitting an entrapment instruction at trial, which Capps alleged resulted in his conviction. The district court granted Capps's relief, ordering his release unless a retrial took place within ninety days. Sullivan, the state warden, subsequently appealed.

The Tenth Circuit, applying a "cause and prejudice" test, upheld

the district court's order. The court stated that Capps fulfilled the "cause" requirement. The court explained that Capps' attorney employed an unreasonable trial strategy when he demanded that Capps admit to the crime hoping for an acquittal through jury sympathy, rather than raising an entrapment defense as supported by the evidence. The court was convinced that defense counsel's inadequacy increased the probability of a different trial result.

United States v. Coffman, 905 F.2d 330

Author: Judge Tacha

Defendant, Coffman, alleged that the district court should have dismissed his indictment, because it violated the Interstate Agreement on Detainers ("IAD"). Specifically, Coffman argued that the United States violated the anti-shuttling provisions of the IAD by returning him to state custody before sentencing. Coffman referred to the IAD's requirement that a "trial" be had prior to returning the prisoner to his place of incarceration. Since "trial" encompasses the sentencing phase, and since he was not sentenced prior to being returned to the state prison, the IAD required dismissal of his federal charges.

The Tenth Circuit affirmed the district court's decision. The court noted that the purpose of the IAD is to reduce prisoner uncertainty caused by untried indictments, informations, or complaints. Uncertainty caused by a delay in sentencing is minimal when compared with the uncertainty resulting from untried charges. Moreover, the court concluded that the IAD's use of the word "trial" did not include the sentencing phase. The district court's refusal to dismiss was, therefore, not error.

Coleman v. Saffle, 912 F.2d 1217

Per Curiam

Defendant, Coleman, appealed the district court's denial of his third petition for federal *habeas corpus* relief, and his motions for an evidentiary hearing and stay of execution. On appeal, Coleman argued that he was deprived of fair and reliable sentencing because the state hospital that determined his competency did not disclose his medical records. Also, Coleman contended that the district court erred in not granting an evidentiary hearing on the issue of his competency. Last, Coleman argued he was denied effective assistance of counsel.

The Tenth Circuit denied Coleman's request of post-conviction relief. First, the court ruled that the medical records were not material because they contained negative as well as positive findings regarding Coleman's competency. Accordingly, the court concluded that there was no reasonable probability of a different result had the evidence been disclosed. Further, there was no probability sufficient to undermine confidence in the outcome of the proceeding. Moreover, because there was no evidence undermining a doctor's competency evaluation, an evidentiary hearing on Coleman's mental condition was not mandated. Fi-

nally, the court declined to reach the claim of ineffective assistance of counsel because the claim did not allege new or different grounds.

United States v. Collins, 420 F.2d 619

Author: Judge Baldock

Defendant, Collins, appealed his conviction for income tax evasion. He argued that the district court gave an improper jury instruction on the issue of good faith and violated his right to counsel by revoking the *pro hac vice* admission of his attorney.

The Tenth Circuit affirmed, holding that the good faith jury instruction was proper. The court reasoned that the objective reasonableness of Collins's belief could be considered in determining whether his subjective belief was reasonable. Also, the court upheld the revocation of the attorney's admission. The district court could conclude that the attorney's disregard of ethical principles would continue based on previous judicial proceedings and the frivolous briefs filed during the case. Moreover, the district court properly balanced Collins's right to counsel of choice against society's need for orderly administration of justice.

Colorado v. Lopez, 919 F.2d 131

Author: Judge McKay

Plaintiff, State of Colorado, brought suit in state court, charging defendant, Lopez, with three counts of fraud by check. Lopez filed a petition for removal pursuant to 28 U.S.C. §§ 1443, 1446. The district court subsequently remanded. The district court ruled that § 1443 does not authorize removal to protect Lopez's sixth amendment right to a fair trial.

The Tenth Circuit affirmed the district court's remand. The court reasoned that Lopez failed to satisfy the requirements for removal under § 1443. Specifically, Lopez made no claim that he was denied a right arising under a federal law which provides for civil rights. Instead, Lopez argued, he was denied his constitutional right to a speedy trial. Pursuant to § 1443, this right does not arise under law providing for civil rights.

United States v. Daily, 921 F.2d 994

Author: Chief Judge Holloway

Defendants, Daily and Figge, appealed their convictions for conspiring to commit wire fraud and submitting false statements as to matters within the jurisdiction of a federal agency. On appeal, both alleged that: (1) the district court lacked subject matter jurisdiction; (2) the indictment insufficiently charged the offense at issue, or was improperly broadened by the district court; (3) the district court erred in failing to hold an evidentiary hearing as to the validity of a search warrant; (4) the government improperly failed to provide the defendants with exculpatory evidence; (5) the district court erred in its instructions to the jury

regarding materiality; (6) there was a fatal variance between the indictment and the proof regarding multiple conspiracies; (7) the district court erred in failing to instruct the jury regarding substantial character evidence; and (8) there was insufficient evidence to support their conspiracy convictions.

The Tenth Circuit first held that it had jurisdiction. The court reasoned that the government had no obligation to make a jurisdictional showing because the federal government has territorial jurisdiction over certain conduct which occurs outside the fifty states. Second, the court ruled that the indictment was sufficient. The court explained that the indictment contained all of the essential elements of the conspiracy offense and the underlying substantive offenses, and also provided sufficient detail which should have put Daily and Figge on notice of the charges against them. Moreover, although noting that the indictment was lengthy and somewhat confusing, the court ruled that it was not improperly broadened. Third, the court rejected the argument that an evidentiary hearing should have been held to determine whether certain evidence should have been suppressed. The court explained that Daily and Figge had insufficient privacy interests to object to the allegedly illegal search. Fourth, Daily and Figge's argument that certain evidence was not provided to them by the government was found to be baseless. Fifth, the court ruled that the district court did not err in refusing to instruct the jury on the issue of materiality as an essential element of wire fraud. The court reasoned that the district court properly treated the question of materiality as one of law. Moreover, there is a materiality aspect to the determination of whether the acts of an accused give rise to a scheme of fraud. The district court properly submitted this aspect to the jury as one component of the larger factual question regarding the scheme to defraud. Sixth, the court rejected Daily and Figge's variance challenge. The court reasoned that there was sufficient evidence upon which a jury could find beyond a reasonable doubt a single conspiracy. The fact that a number of separate transactions may have been involved did not establish the existence of a number of separate conspiracies. Moreover, the court found no prejudicial error in the district court's failure to give an express multiple conspiracy instruction. When viewed as a whole, the instruction adequately covered the question of multiple conspiracies. Specifically, the jury had notice that in order to convict Daily and Figge, it had to find that the conspiracy existed and that each defendant was a member of it. Seventh, the district court committed error in failing to give a jury instruction regarding character. The court explained that Daily and Figge presented evidence as to their good character and the character evidence concerned traits relevant to the offense charged. Finally, the court found sufficient evidence to support the jury's verdicts of guilty as to both defendants. The court, however, reversed and remanded in light of the prejudicial error regarding character evidence.

United States v. DeFundora, 893 F.2d 1173

Author: Judge Ebel

Defendant, DeFundora, was convicted by a grand jury for distribution of cocaine and unlawful travel in aid of racketeering. DeFundora appealed, arguing: (1) there was insufficient evidence to support the distribution of cocaine conviction because the substance allegedly distributed was not subjected to scientific analysis; and (2) there was insufficient evidence supporting her Travel Act conviction.

The Tenth Circuit affirmed the judgment of the district court. First, the court stated that scientific evidence need not be introduced to prove the identity of a substance. The court reasoned that as long as there is sufficient lay testimony or circumstantial evidence to prove to a jury beyond a reasonable doubt that cocaine was the identified substance, a lack of scientific evidence does not warrant reversal. Both direct and indirect evidence was presented that could have led the jury to conclude beyond a reasonable doubt that substances allegedly sold by DeFundora were cocaine. For example, there was indirect evidence that the substance was able to be resold as cocaine. Moreover, there was indirect evidence that DeFundora had previously dealt in cocaine. Second, the court stated that to prove an unlawful travel charge, the government must show DeFundora committed an overt act after having traveled or after having used the facilities of interstate or foreign commerce. The court held that possession of an object is an act if the possessor knowingly receives it or if he becomes aware that he possesses it for a sufficient period of time. DeFundora's cocaine possession constituted an overt act, and she had just completed travel from Miami to Oklahoma in furtherance of her intent to distribute.

United States v. Fox, 902 F.2d 1508

Author: Chief Judge Holloway

Defendant, Fox, was convicted of conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846, and interstate travel for the purpose of promoting unlawful activity, in violation of the Travel Act, 18 U.S.C. § 1952. Fox appealed, asserting that: (1) his motion to suppress evidence seized at his warrantless arrest was improperly denied because the arresting officers lacked probable cause; (2) the evidence was insufficient to support his conspiracy conviction; (3) the district court erred in refusing to give his tendered jury instruction which concerned the difference between a conspiracy and a buyer-seller relationship; and (4) the government failed to prove a business enterprise within the meaning of the Travel Act.

The Tenth Circuit affirmed the decision of the district court. First, the court ruled that the warrantless arrest was valid because at the time of the arrest the agents had probable cause. Specifically, the facts and circumstances within the arresting officers' knowledge were sufficient to warrant a prudent man in believing that the arrestee had committed or

was committing an offense. Accordingly, the evidence seized at the warrantless arrest was properly admitted into evidence. Second, the court found that the evidence was sufficient to support Fox's conspiracy conviction. In making this determination, the court used a three part test: (1) the evidence must show that two or more persons agreed to violate the law; (2) the defendant knew at least the essential objectives of the conspiracy; and (3) the defendant knowingly and voluntarily became a part of it. The evidence showed that Fox acted with two other people to purchase cocaine in Las Vegas with intent to transport it into Colorado for distribution. Consequently, there was an ongoing course of conduct that demonstrated an interdependence among Fox and his two partners. Third, the district court did not commit reversible error by failing to give Fox's instruction. The court explained that, as a whole, the charge adequately instructed the jury. In particular, the charge covered the essential requirements for a finding of conspiracy, in contrast to the acts amounting only to separate transactions. Finally, the district court properly held that Fox engaged in a business enterprise pursuant to the Travel Act. The court explained that under this Act, the term "business enterprise" means a continuing course of conduct, rather than sporadic casual involvement in a proscribed activity. The court found that there was sufficient evidence from which a jury could reasonably infer that Fox's involvement in the interstate transportation of narcotics was continuous.

United States v. Frank, 901 F.2d 846

Author: Judge Brimmer, sitting by designation

Defendant, Frank, was charged with aggravated sexual abuse on an Indian Reservation. Following *voir dire*, Frank moved to dismiss two jurors for cause because one indicated that he was a personal friend of the prosecutor, and the second said she feared serving on a jury because of having to stay alone in a motel. The district court denied both challenges, forcing Frank to use his preemptory challenges to excuse both jurors. At the conclusion of the government's case, Frank moved for acquittal on the grounds that the government failed to prove the rape took place on an Indian Reservation. The court denied the motion, and Frank subsequently appealed.

The Tenth Circuit affirmed the district court's denial of the motions. The court ruled that the district court properly dismissed the motion for acquittal because the evidence presented was sufficient to find that the rape occurred on the Reservation. The court also found that the district court did not abuse its discretion when it failed to dismiss the two jurors for cause. The court reasoned that both appeared to be capable of rendering fair and impartial verdicts.

Gee v. Kansas, 912 F.2d 414

Author: Judge Baldock

After escaping federal custody in New York State, plaintiff, Gee, was

arrested and convicted in Wyoming for aggravated robbery. Following his sentencing in Wyoming, Gee was returned to federal custody to complete the remainder of his federal sentence in Leavenworth, Kansas. Upon Gee's release, the Leavenworth sheriff's office immediately extradited Gee to Wyoming to serve his sentence on the robbery charge. Gee filed a *habeus corpus* petition challenging the extradition, but the district court dismissed his motion. Gee appealed, asserting that the Leavenworth sheriff's actions constituted "kidnapping" because neither Kansas nor the Leavenworth's sheriff's office had jurisdiction to participate in the extradition process.

The Tenth Circuit affirmed the district court's dismissal of Gee's *habeus corpus* petition. The court held that the Leavenworth sheriff had probable cause to arrest and detain Gee because: (1) Wyoming properly followed extradition procedures; and (2) Gee was a fugitive from justice since he had not served his Wyoming sentence.

United States v. Glover, 911 F.2d 419

Author: Judge Kane, sitting by designation

Defendant, Glover, originally pleaded not guilty to drug-related conspiracy charges. On the morning of trial, he changed his plea to guilty. Prior to his sentencing, Glover moved to withdraw his guilty plea. The district court denied this motion, and Glover subsequently appealed. He argued that he pleaded guilty at the urging of his counsel without understanding the circumstances.

The Tenth Circuit affirmed the district court's judgment refusing to allow Glover to withdraw his pleas of guilty. The court held that fairness and justice did not support the plea withdrawal because: (1) the right to withdraw a plea is in the discretion of the court; (2) the first plea change was made at the eleventh hour with the witnesses, exhibits, jurors, judge, prosecutors and defense counsel ready for trial; (3) no useful purpose would be served; and (4) in the face of Glover's admitted and palpable guilt, the administration of justice would be seriously disserved.

United States v. Harris, 903 F.2d 770

Author: Judge Saffels, sitting by designation

Defendant, Harris, was convicted of possession with intent to distribute marijuana and traveling in interstate commerce to facilitate possession of marijuana with intent to distribute. Harris was also convicted of forfeiture of United States currency. On appeal, Harris asserted that insufficient evidence was presented to sustain the conviction for interstate transport, that several search warrants were invalid because they were overbroad, and that the government's use of an FBI agent as an expert witness was improper.

The Tenth Circuit affirmed, holding that there was sufficient evidence to support Harris's conviction for illegal marijuana trafficking.

The court explained that Harris performed various overt acts, including possessing and transporting a quantity of marijuana with the intent to distribute. The court further held that the search warrants were sufficient. The court explained that the totality of the circumstances supported a fair probability that the contraband or evidence of a crime would be found in a particular place. Moreover, the warrant was valid even though it described the items to be seized in broad and generic terms. Finally, the FBI agent's expert testimony was proper. The court explained that the agent's specialized knowledge of record-keeping in the "drug business" assisted the trier of fact in understanding the evidence.

United States v. Hernandez, 913 F.2d 1506

Author: Judge Baldock

Dissent: Judge McKay

Defendant, Hernandez, was convicted by a jury of making false statements in connection with the acquisition of a firearm, and of receiving a firearm while an illegal alien. On appeal, Hernandez argued that the district court erred in: (1) failing to suppress his statements to the arresting officer because translation of his *Miranda* rights was inadequate, thereby precluding an intelligent waiver; (2) holding that his application for amnesty as an illegal alien could be admitted into evidence; (3) admitting computer printouts reflecting his amnesty application; and (4) denying his motion for a judgment of acquittal based on insufficient evidence.

The Tenth Circuit affirmed the ruling of the district court. The court first held that the statements made to the arresting officer were admissible. Although Hernandez claimed a limited understanding of English, the court refused to overturn the district court's finding. The court explained that the translation of Hernandez's *Miranda* rights was sufficient to apprise him of the nature of the right being abandoned and the consequences of the decision to abandon it. Moreover, Hernandez's communications with the trooper in English indicated that he understood the language. Second, the court held that admitting Hernandez's amnesty application into evidence, in order to prove he received a firearm before making the application, was consistent with the purposes of the Immigration Reform and Control Act of 1986. The Act only requires confidentiality of such an application in immigration-related proceedings, not in collateral criminal actions. Third, the court held that the admission of computer printouts, which reflected Hernandez's amnesty application, fell under the exceptions to the rule against hearsay. The court explained that the data compilation was performed pursuant to regular business practice. The fact that the hard copy was prepared for litigation was irrelevant. Finally, the court held that the convictions were supported by sufficient evidence.

United States v. Jalilian, 896 F.2d 447

Author: Judge Tacha

Plaintiff, Jalilian, pleaded guilty to converting his uncle's United States Treasury check to his own use. The district court placed Jalilian on probation with the special condition that he return to his native country within forty-five days and not return to the United States until legally authorized to do so. The special condition was later modified, requiring Jalilian to leave the country, but not necessarily to his "native country." Jalilian appealed the modified condition.

The Tenth Circuit reversed and remanded the district court's ruling. The court ruled that although the special condition requiring Jalilian not to reenter the country without legal authorization was proper, the district court exceeded its authority under the probation statute when it ordered Jalilian to leave the country. The court reasoned that only the United States Attorney General has deportation authority.

United States v. Jenkins, 904 F.2d 549

Author: Judge Seymour

Defendant, Jenkins, was convicted of possessing with intent to distribute and distributing cocaine and marijuana, conspiring to possess and distribute controlled substances, violating the Travel Act, engaging in a continuing criminal enterprise, distributing a controlled substance to a person under twenty-one years of age, and committing income tax evasion. On appeal, Jenkins contended: (1) there was insufficient evidence to convict him of engaging in a continuous criminal enterprise, because he did not hold the position of organizer or supervisor; (2) the district court erred in admitting testimony of a co-defendant's violent acts; (3) the district court erred in denying his motion to sever; (4) the district court erred in not requiring the jury to hear the criminal charges and the criminal forfeiture proceedings in two phases; and (5) the district court erred in not dismissing the indictment for grand jury abuse.

The Tenth Circuit first held that Jenkins need not be a dominant organizer to be convicted of running a continuing criminal enterprise. Rather, it was sufficient that he occupied some managerial position over five or more persons. Second, Jenkins was not unfairly prejudiced by evidence of a co-defendant's violent acts. The court reasoned there was little danger that the jury would confuse Jenkins with his co-defendant. Further, any chance of unfair prejudice was ameliorated by a limiting instruction. Third, the district court properly denied Jenkins' motion to sever. The court explained that Jenkins failed to show prejudice and failed to show a substantial factual overlap in the charges against him and his co-defendant. Fourth, the district court was entitled to assume that evidence concerning guilt and forfeiture could be heard together. The court reasoned that Jenkins failed to inform the district court of his

desire for a bifurcated trial. Finally, Jenkins failed to show how testimony before the grand jury amounted to prejudice.

Johnson v. Rogers, 917 F.2d 1283

Author: Judge Ebel

Plaintiff, Johnson, sought a writ of *mandamus* from the Tenth Circuit directing defendant, Judge Rogers, to hear and decide Johnson's petition for *habeas corpus* relief. The petition for writ of *habeas corpus* was at issue in Judge Rogers' chambers for more than fourteen months without being resolved.

The Tenth Circuit granted the writ of *mandamus* and ordered Rogers to hear and decide Johnson's petition for writ of *habeas corpus* within sixty days. The court noted the problem of docket congestion, but stated that a petition for writ of *habeas corpus* must be heard within a reasonable time. The court granted the writ of *mandamus* after determining that: (1) Johnson was entitled to the relief sought; (2) there was a plainly defined duty on the part of Rogers to hear Johnson's petition in a timely manner; (3) no other adequate remedy was available; and (4) the right to such relief was clear and undisputable. The court stated that a fourteen-month delay in hearing a petition for writ of *habeas corpus* will not always justify the granting of a writ of *mandamus*. When the whole reason for a lengthy delay is docket congestion, however, such a delay is impermissible.

United States v. Kline, 922 F.2d 610

Author: Judge Cook

The United States Department of Health and Human Services ("HHS") administers and funds programs that provide physical therapy to patients with musculo-skeletal problems. Defendant, Kline, was employed by a medical clinic that provides such therapy and receives payment from HHS for her services. Kline was convicted of presenting various claims to HHS requesting payment for medical services allegedly provided, when no such services were provided. She appealed her conviction.

The Tenth Circuit reversed the district court and vacated the conviction. Upon review of the evidence, the court found that there was insufficient evidence to support a finding that Kline made and presented the claims. The court also noted that the district court improperly read a jury instruction titled "Aiding and Abetting." The court reasoned that since the government did not charge Kline with aiding and abetting in the indictment or allege in the alternative, that Kline had caused the false claims to be presented, the government was not allowed to proceed on an aiding and abetting theory. Since the jury might have convicted on an improper basis, the giving of the instruction was reversible error.

United States v. Levy, 905 F.2d 326

Author: Judge Anderson

Defendant, Levy, was extradited from Hong Kong and convicted of possession of cocaine with intent to distribute and operation of a continuing criminal enterprise ("CCE"). Levy only appealed the one count of operating a CCE. He argued that his extradition and trial on the CCE charge violated the doctrines of dual criminality and specialty. Specifically, Levy argued that CCE is not an extraditable offense because it is characterized differently in Hong Kong. Also, he argued that he was never extradited on the CCE charge because the order surrendering him to American authorities did not mention CCE by name, nor did it recite the crime's element. Thus, he contended the doctrine of specialty, which states that a person can be prosecuted for only those charges on which he was extradited, barred the count. Levy also argued that the CCE count should have been dismissed because witnesses presented to the grand jury were discovered through electronic surveillance, and the authorization order did not mention CCE. Levy's final argument was that the indictment did not sufficiently set out the element of a CCE which requires three or more such violations.

The Tenth Circuit affirmed the decision of the district court. First, the court stated that the focus of the dual criminality doctrine is on the criminality of a defendant's alleged conduct, not on how the crime is defined in the statutes he is accused of violating. Consequently, the fact that the particular act is classified differently in two nations does not defeat extradition. Thus, since Levy's alleged conduct of leading a cocaine trafficking operation is illegal in both Hong Kong and the United States, it satisfied the doctrine of dual criminality. Moreover, the court found that the doctrine of specialty was not violated. The court reasoned that the extradition order specifically referred to the CCE count, and that the foreign courts clearly considered whether Levy could be extradited on that charge. The court then held that even if the use of the witnesses detected by electronic surveillance violated Title III of the Omnibus Crime Control and Safe Streets Act, Levy's exclusive remedy was a civil action, not the dismissal of the CCE count. Finally, the court held that Levy was tried on four counts and convicted on three which met the requirement of three or more violations in order to constitute a continuing series of violations.

United States v. Maez, 915 F.2d 1466

Author: Judge Logan

Defendant, Maez, pleaded guilty to aiding and abetting bank larceny in violation of 18 U.S.C. § 2113(b). Maez requested return of the money seized by the FBI agents and given to the robbed bank. The district court denied the motion and Maez appealed, claiming that: (1) the bank never contested his ownership; (2) the money seized from his house could not be from the bank; (3) he earned the money legitimately from odd jobs.

The Tenth Circuit affirmed the district court's holding. First, the fact that the bank did not contest Maez's ownership, but the government did contest it, is sufficient. The court explained that the government has a sufficient interest in returning property to its true owner. Second, the court rejected Maez's argument that because banks do not keep their money in "little wads," the money seized from his home could not be from the bank. Finally, at the hearing Maez presented no evidence regarding the source of the money.

Mahorney v. Wallman, 917 F.2d 469
Per Curiam

Defendant, Mahorney, petitioned the court for *habeas corpus* relief. In his petition, Mahorney argued that his 1980 conviction for first degree rape was based on the prosecutor's impermissible comments concerning a defendant's presumption of innocence. The district court used a fundamental fairness analysis and concluded that the prosecutorial misconduct did not warrant vacation of the conviction.

The Tenth Circuit reversed the district court and remanded with directions to issue the writ unless the state retried Mahorney within ninety days. The court found that the improper comments were sufficiently prejudicial to Mahorney's right to a presumption of innocence. The court explained that the fundamental fairness analysis did not govern because the prosecutor's conduct constituted an affirmative denial of a constitutional right, rather than a mere omission of an instruction.

United States v. Maines, 920 F.2d 1525
Author: Chief Judge Holloway

Defendant, Maines, pleaded guilty to possession of a firearm by a convicted felon. He was sentenced to a fifteen year enhanced sentence because of three previous violent felonies. The district court enhanced his sentence after concluding that a prior Texas burglary conviction presented a serious potential risk of personal injury to another. Thus, the conviction was categorized as a violent felony. Maines appealed, claiming that the Texas statute for burglary was statutorily defined and should not be classified as a violent felony. He alleged that to construe burglary as defined by other states violated equal protection principles.

The Tenth Circuit affirmed the conviction citing two basic principles. First, a uniform definition of burglary was judicially developed for the purpose of sentence enhancement. Maines's prior conviction fell under this definition. Moreover, the court found that although statutory definitions of prior offenses should only be considered, there was no prejudicial error in the district court's examination of the particular facts underlying the conviction.

Martin v. Kaiser, 907 F.2d 732

Author: Judge Anderson

Defendant, Martin, was convicted of six charges of solicitation of murder. He appealed the district court's denial of his petition for a writ of *habeas corpus*. In his petition, Martin asserted four errors by the Oklahoma courts: (1) jurisdictional error in trying him under the solicitation statute; (2) admitting an enhanced tape recording and allowing the jury to view a transcript made therefrom; (3) unfair limitation by the district court of Martin's right to cross-examination; and (4) error in sentencing Martin to six consecutive sentences for one act of solicitation. The district court denied the petition, holding that the first three allegations were without merit and that the fourth allegation was barred due to failure to raise the issue in the state court appeal.

On *de novo* review, the Tenth Circuit affirmed the district court's denial of the petition. The court held that conviction under the Oklahoma solicitation statute was appropriate since the statute governs solicitation of murder, not the location of the murder itself. The court also found that neither the introduction of enhanced tape recordings nor the limitations imposed upon defense's cross-examination rose to the level of constitutional error. Finally, the court held that Martin's double jeopardy argument regarding the six concurrent ten year sentences was without merit. The court based its decision on the lack of showing that the sentence was more detrimental to Martin.

United States v. Martinez, 912 F.2d 419

Author: Judge Tacha

Defendant, Martinez, was convicted for use of a firearm in drug trafficking in violation of 18 U.S.C. § 924(c)(1). Martinez appealed, arguing that: (1) he did not possess the requisite degree of dominion and control over the unloaded firearm to merit conviction; and (2) the presence of an unloaded firearm is not the "use" of a firearm proscribed in § 924(c)(1).

The Tenth Circuit affirmed the district court's decision. The court found Martinez's admission of using the gun to scare people was sufficient to establish that he exercised the requisite degree of dominion and control over the gun. Second, the use of a gun, even if unloaded, in connection with a crime of violence or drug trafficking falls within the prohibitions of § 924(c). The court explained that unloaded firearms have the same intimidating effect on victims and observers when pointed or displayed. Also, they increase the risk of violence by others who may respond to the perceived danger represented by the presumably loaded gun.

McConnell v. Martin, 896 F.2d 441

Author: Judge Ebel

Defendant, McConnell, was paroled from a prison term. While out

on parole, McConnell was arrested for possession of narcotics and several firearms violations. Subsequently, the parole commission issued a parole violator warrant, charging that McConnell violated terms of his parole. The warrant was not to be executed if McConnell was in custody. The warrant, however, was executed despite the fact that McConnell was in custody. Subsequently, the parole commission ordered withdrawal of the original warrant and issued a new parole violator warrant. McConnell filed a writ of *habeas corpus*. In his petition, McConnell argued that because the original parole violator warrant was executed on February 19, 1985, his original sentence commenced running again on that date. The district court granted McConnell's petition, stating that once validly executed, a parole violator warrant can not be withdrawn. Plaintiff, Warden Martin, subsequently appealed.

The Tenth Circuit reversed the district court's order granting *habeas corpus* relief. The court ruled that the instructions on the parole violator warrant did not authorize the marshal to execute it. Specifically, the warrant was not to be executed if McConnell was in custody. Since McConnell was in custody, the attempted execution of the warrant was unauthorized. Accordingly, the parole commission had the authority to withdraw the first warrant and to issue a second warrant.

United States v. Miller, 907 F.2d 994

Author: Judge Garth, sitting by designation

Defendant, Miller, appealed his conviction on three counts of making false statements in violation of 18 U.S.C. § 1001. He also appealed the district court's subsequent denial of his 28 U.S.C. § 2255 application to set aside his conviction. Miller, a tax attorney and accountant, was found guilty of orchestrating the back-dating of deeds, pension plan reports, and other financial documents in order to avoid tax liabilities. On appeal, Miller asserted that he received inadequate assistance of counsel. Specifically, the attorney did not investigate Miller's mental condition, make requisite motions during trial, or allow Miller to unambiguously deny his guilt.

The Tenth Circuit affirmed Miller's conviction and the district court order denying his application to set aside the conviction. The court ruled that Miller did not prove his counsel's representation was unreasonable under prevailing professional norms. Moreover, even if unreasonable representation were to be assumed, Miller did not suffer sufficient prejudice to warrant a new trial. The court found no evidence that the attorney was aware of Miller's mental health problems, that the decision to ignore witnesses' misconduct was a result of carelessness, or that failure to give Miller an opportunity to explicitly deny, rather than indirectly deny, the backdating of documents prejudiced his claim of innocence.

United States v. Morales, 908 F.2d 565

Author: Judge Moore

Defendant, Morales, appealed his district court conviction for conspiracy to possess with intent to distribute marijuana, possession with intent to distribute marijuana, and distribution of marijuana. Morales contended that the district court abused its discretion by improperly denying his motion to disclose the identity of a confidential informant.

The Tenth Circuit concluded that the district court did abuse its discretion by denying the motion. Consequently, the court remanded the case back to the district court for an *in camera* hearing to determine whether the informant was a mere tipster or whether his testimony was essential to Morales's defense. In reaching this decision, the district court must balance the public's interest in protecting the flow of information against the individual's right to prepare his defense. The record contained insufficient evidence to determine whether the district court applied this balancing test in denying Morales's motion. The court, therefore, stated that if the district court decides the identity of the confidential informant should be revealed, Morales's sentence should be vacated and a new trial given with the benefit of the additional testimony.

United States v. Pena, 920 F.2d 1509

Author: Judge Conway, sitting by designation

Defendant, Pena, was convicted of possession with intent to distribute cocaine. He received the mandatory minimum sentence of not less than twenty years. Pena appealed his conviction and sentence, contending that: (1) his detention after the initial stop for speeding was unreasonable, violated the fourth amendment, and tainted his consent to search; (2) the search of his vehicle exceeded the scope of his consent; (3) statements made prior to his arrest and receipt of *Miranda* warnings resulted from custodial interrogation and should have been suppressed; (4) the district court erred in failing to dismiss the indictment for violation of the Speedy Trial Act; (5) the sentence violated the eighth amendment prohibition against cruel and unusual punishment; and (6) he was denied effective assistance of counsel in violation of the sixth amendment.

The Tenth Circuit affirmed Pena's conviction and sentence. First, the court found ample evidence suggesting the car was stolen. Accordingly, the court upheld the district court's determination that Pena's detention after the initial stop was reasonable and his consent was valid. Second, the record established that Pena voluntarily consented to the search and observed the officer's inspection without objecting or attempting to limit or retract his consent. Thus, the court held that the search was conducted within the general scope of permission granted. Third, the district court properly allowed into evidence statements made prior to Pena's arrest. The court found no evidence of physical force or a show of authority sufficient to support Pena's contention that he was in

custody when he made the statements. Fourth, the court rejected Pena's contention that the Speedy Trial Act was violated. By computing the excludable delays attributable to Pena's case, the court found that the trial's commencement clearly met the seventy-day mandate. Fifth, Pena's sentence was not unconstitutionally disproportionate. The court based its decision on Pena's degree of culpability, the gravity of his offense, and his minimal sentence. Finally, on *de novo* review, the court found nothing to indicate that the defense attorney's decision to not question the arresting officer was beyond the range of reasonable professional assistance.

United States v. Pettit, 903 F.2d 1336

Author: Judge Babcock, sitting by designation

Defendant, Pettit, was convicted of possession of cocaine with intent to distribute. Pettit appealed, contending the district court erred in: (1) denying his motion *in limine* to exclude testimony regarding Pettit's girlfriend's bad acts; (2) denying his motion to suppress evidence because the search warrant was obtained without probable cause; and (3) adjusting his base offense level upward.

The Tenth Circuit affirmed the conviction, but reversed the sentence and remanded for resentencing. First, even though Pettit was not the principle actor, the record established a reasonable indication that he was a party to his girlfriend's bad acts. Second, in determining whether there was probable cause to issue a search warrant based on an informant's statements, the court assessed the totality of the circumstances. The court ruled that there was probable cause to issue a search warrant because the informant's information was assessed for three months and was corroborated by independent law enforcement surveillance. Moreover, the court refused to consider Pettit's argument that he was not shown the warrant in violation of Fed. R. Crim. P. 41. The court reasoned that issues not raised in the district court will not be considered for the first time on appeal. Finally, in determining Pettit's sentence, the court improperly considered his roles in criminal activity for which he was not convicted.

Rael v. Sullivan, 918 F.2d 874

Author: Judge Brown, sitting by designation

Defendant Rael was found guilty of three counts of extortion and one count of telephone harassment. Rael claimed that the convictions on the counts of extortion were obtained in violation of his due process rights, since the trial court failed to instruct the jury that it must find Rael intended to wrongfully compel the person threatened to do an act against her will. Rael challenged the district court's dismissal of his petition for writ of *habeas corpus*.

The Tenth Circuit affirmed the dismissal of the petition for writ of *habeas corpus*. The court held that because the jury was fully instructed

on all the elements of extortion under New Mexico law, there was no due process violation.

United States v. Reid, 911 F.2d 1456

Author: Judge Baldock

Defendant, Reid, was convicted of various drug charges. He appealed, claiming that: (1) his indictment should have been dismissed because the grand jury was not apprised of the complete criminal record of the government's lead witness; (2) his indictment should have been dismissed or a new trial granted because the government's lead witness testified that he did not have an agreement with the government while Reid was led to believe that such an agreement existed; and (3) the district court misapplied federal sentencing guidelines concerning the quantity of drugs involved, allegations of obstruction of justice, the nature of Reid's role in the crime, and the computation of Reid's criminal history.

The Tenth Circuit affirmed Reid's conviction. First, the court held that the government was not obliged to disclose its lead witness's complete criminal history to the grand jury. The court reasoned that the grand jury was apprised of the witness's current conviction in a related case. Second, the government's failure to disclose to the defense the lack of an agreement with its lead witness was not reversible error. Third, although the district court's calculation concerning the amount of drugs involved was incomplete, it did not change Reid's base offense level. Fourth, the district court properly increased Reid's sentence. The court explained that Reid threatened to put a "hit" on two witnesses, was an organizer or leader of an "extensive" criminal activity, and committed an offense within two years of his release from a juvenile detention camp.

United States v. Rhodes, 913 F.2d 839

Author: Judge Parker, sitting by designation

Defendant, Rhodes, appealed the district court's denial of his motion to withdraw a guilty plea to possession of a cocaine based substance. On appeal, Rhodes contended that: (1) the district court erred in finding that he voluntarily pleaded guilty; (2) defense counsel's failure to independently determine Rhodes's criminal record constituted ineffective counsel; and (3) the district court abused its discretion in denying his motion to withdraw the plea.

On *de novo* review, the Tenth Circuit affirmed the holdings of the district court. The court found Rhodes's guilty plea to be voluntary because he had full knowledge of the minimum and maximum sentences he could receive and because of his repeated admissions of guilt. Moreover, Rhodes's attorney's erroneous estimate of the sentence did not render the plea involuntary. Second, the court held that Rhodes's attorney's performance was not so deficient that it violated Rhodes's right to effective assistance of counsel. The court explained that the attorney's

failure to independently review Rhodes's prior criminal history did not deprive Rhodes of effective assistance. This is because Rhodes failed to inform his attorney of five of his six prior criminal convictions. Also, Rhodes conceded that he did not give his attorney any reason to question the accuracy or completeness of his statements. Finally, the court held that the district court did not abuse its discretion in denying the motion to withdraw. Rhodes failed to meet his burden of showing a "fair and just reason" for the withdrawal because among many other factors, he did not assert his innocence, did not explain the lateness of his motion to withdraw, and was assisted by counsel.

Robinson v. Maruffi, 895 F.2d 649

Author: Judge Holloway

Defendants were Albuquerque police officers ("Maruffi") whose conduct allegedly deprived plaintiff, Robinson, of his constitutional rights. Maruffi appealed the district court's decision in favor of Robinson, arguing that: (1) Robinson's claims were barred by the statute of limitations; (2) Robinson was collaterally estopped from pursuing this action; (3) Robinson failed to prove the necessary causal link between the individual defendant's alleged conduct and his injuries; (4) it was prejudicial error for the district court not to instruct the jury on entrapment; (5) several jury instructions were erroneous and, taken as a whole, highly prejudicial; (6) the court erred by allowing Robinson's counsel to call witnesses for direct examination and not allowing defendant's counsel immediate cross-examination; and (7) the court's award of attorney's fees to Robinson was in error.

The Tenth Circuit affirmed the district court's decision. The court found that Robinson's civil rights claim was not barred because it began in August, 1984, which was within the three year limitation period following Robinson's acquittal in his October, 1983 trial. It dismissed Maruffi's collateral estoppel claim because it was not raised as an affirmative defense before the district court. Third, Robinson's injuries were causally linked to Maruffi's actions because all the intervening parties depended on his false testimony. The district court properly denied Maruffi the right to present a defense based on the legal definition of entrapment. The court reasoned that the entrapment issue was irrelevant, and a party is not allowed a jury instruction if its defense theory is not factually or legally supported. Fourth, the district court did not err in instructing the jury regarding insufficient evidence and lack of probable cause. The court reasoned that competent evidence was introduced to support Robinson's claims of denial of liberty and denial of the right to a proper probable cause determination. Maruffi's claim of error regarding inability to cross-examine witnesses was rejected because Maruffi failed to timely object to the sequence of witnesses, and had an opportunity to cross-examine all witnesses. Since the district court's decision was affirmed, Maruffi's claim that the award of attorney's fees should be reversed along with the judgment was denied.

United States v. Ryan, 894 F.2d 355

Author: Chief Judge Holloway

Defendant, Ryan, entered a conditional plea of guilty to one count of unlawful use of credit cards in transactions affecting interstate commerce and one count of obtaining goods of an aggregate value of \$1000 or more in violation of 18 U.S.C. § 1029(a)(2). Ryan appealed, claiming: (1) transactions in different states could not be aggregated to satisfy the jurisdictional amount of \$1000; (2) venue was improperly placed in Kansas; and (3) aggregation of amounts affecting interstate commerce was improper.

The Tenth Circuit affirmed the decision of the district court. The court held that the aggregation of amounts under 18 U.S.C. § 1029(a) was proper. The court reasoned that the broad wording of the statute emphasized no geographic limitations. Also, by using the phrase "affects interstate or foreign commerce," the House Committee on the Judiciary intended to establish a broad jurisdictional basis. Second, venue is determined from the nature of the crime and the location of the acts constituting it. Thus, since Ryan pleaded guilty to using and obtaining stolen credit cards and thereby affected interstate commerce in Kansas, it follows that venue was proper in Kansas. Finally, the court dismissed the interstate commerce claim because Ryan failed to properly preserve it for appeal. The court stated that nowhere in the previous motion to dismiss did Ryan argue that interstate commerce was not affected.

United States v. Schreier, 908 F.2d 645

Author: Judge Logan

Concurrence: Judge Dunbould, sitting by designation

Defendants, Gayle and Irwin Schreier, appealed three criminal convictions for wire fraud. The convictions were the result of a scheme by the Schreiers in which unclaimed airline mileage was credited to fictitious persons for the purpose of accumulating free airline travel tickets. On appeal, the Schreiers argued that if the mileage credits did constitute property under the criminal wire fraud statute, the property interest belonged to the passengers, not the airlines. Therefore, they argued that their convictions could not stand because the government offered no evidence that they defrauded passengers. Moreover, they could not have defrauded the airlines because the airlines had no property interest in the mileage.

The Tenth Circuit affirmed the convictions. The court first stated that because mileage credited to the passengers is considered a liability of the airline for accounting purposes, it constitutes a property interest. Second, the Schreiers committed a fraud on the airlines. The court explained that the Schreiers acquired mileage that would otherwise not have been claimed. Therefore, the Schreiers created a liability for the airlines that otherwise would not exist. Moreover, the taking of intangible property via computer may be the basis for wire fraud.

United States v. Schroeder, 902 F.2d 1469

Author: Judge West, sitting by designation

Defendant, Schroeder, was convicted of interstate communication of a threat to injure another person in violation of 18 U.S.C. § 875(c). On the day of Schroeder's trial, his attorney requested a continuance on the basis that his client suffered from sleep deprivation. The district court explained that in order for there to be a grant of continuance, Schroeder would have to waive his right to a speedy trial. Schroeder refused, and the district court proceeded with trial. Schroeder appealed, claiming that the district court erred in denying his request for a continuance. Specifically, Schroeder claimed that the district court failed to place him on the stand to determine his awareness. Schroeder also claimed that there was insufficient evidence for a conviction, and the district court improperly departed upward from the Sentencing Guidelines after finding an Assistant United States Attorney a "victim" of his threats.

The Tenth Circuit first ruled that the district court did not err in failing to place Schroeder on the stand to determine his awareness. The court reasoned that defense counsel had the opportunity to make a complete offer of proof regarding Schroeder's alleged incompetency. Second, the court ruled that there was sufficient evidence to meet the requirements of the statute. Last, the district court erred in departing upward from the Sentencing Guidelines. The court reasoned that nothing in the record indicated that the attorney received a threat directed towards his person.

United States v. Scott, 901 F.2d 871

Author: Judge Seay, sitting by designation

Defendant, Scott, was convicted of conspiracy to manufacture methamphetamine and of manufacturing methamphetamine. Scott appealed his conviction, claiming that he was denied a fair trial when the district court refused to instruct the jury on the defense of coercion.

The Tenth Circuit affirmed the decision of the district court. The court stated that three elements must be satisfied before the jury will be instructed on a coercion defense: (1) an immediate threat of death or serious bodily injury; (2) a well-grounded fear that the threat will be carried out; and (3) no reasonable opportunity to escape the threatened harm. The court found that Scott failed to meet his threshold burden as to the third element. Consequently, the court stated that since evidence was lacking as to the third element, the district court properly disallowed the defense as a matter of law and properly refused to instruct the jury on coercion.

United States v. Simmons, 912 F.2d 1215

Author: Judge Tacha

Defendant, Simmons, was convicted of failure to appear at a court

proceeding. Simmons appealed, arguing that: (1) evidence regarding his willful violation of 18 U.S.C. § 3146 was insufficient to support the conviction; and (2) notice of the hearing was insufficient.

The Tenth Circuit affirmed the district court's decision. First, the court ruled that Simmons's failure to comply with a supervised release order requiring him to appear at all proceedings was a willful failure. The court determined Simmons was a fugitive who made no attempt to contact his attorney or the court with regard to his voluntary absence. This was in violation of a release order from an alternative incarceration program. The court held that under these circumstances, no actual notice of the hearing was necessary, and notice to Simmons's attorney was sufficient.

United States v. Spedalieri, 910 F.2d 707

Author: Judge Baldock

Defendant, Spedalieri, used an imitation bomb to commit armed robbery. He was convicted pursuant to 18 U.S.C. §§ 2113(a) and (d). Spedalieri subsequently appealed his conviction. Specifically, Spedalieri argued that the district court erred in: (1) denying his motion for acquittal because he did not use an actual bomb; (2) misapprehending its discretionary authority in not departing downward from the Sentencing Guidelines; and (3) not granting a two-level downward adjustment for acceptance of responsibility.

The Tenth Circuit affirmed, holding that a "fake" bomb, as a matter of law, may constitute a dangerous weapon when a victim is placed in reasonable expectation of danger. Second, the district judge's determination that Spedalieri committed a violent act and his decision to not depart downward based on the need to protect the public, constituted a proper exercise of discretion. Third, the court held that the admission of an offense inherent in the insanity defense is not the same as acceptance of responsibility. Since Spedalieri denied committing the offense in a pre-sentence report and then later argued that the affirmative defense of insanity at trial constituted an admission, the district court's refusal to grant a two-level downward adjustment was not clearly erroneous.

United States v. Stanley, 896 F.2d 450

Author: Judge Ebel

Defendant, Stanley, was convicted of receiving child pornography through the mails. Stanley appealed, arguing that the conviction was contrary to law. Stanley explained that by mailing the materials from Japan to himself in Colorado, he never surrendered control. Consequently, Stanley explained that he could not later "receive" the materials within the meaning of 18 U.S.C. § 2252(a)(2)(B). Stanley also contended that the postal inspector's testimony was not proper lay opinion under Fed. R. Evid. 701. Stanley reasoned that the testimony was

not helpful to understanding the ages of persons in the photographs, nor to the determination of a fact at issue.

The Tenth Circuit affirmed the decision of the district court. The court explained that Stanley "received" the child pornography within the meaning of the statute. The court reasoned that Stanley surrendered control over the materials when he gave them to the postal authorities and reacquired control and took possession upon delivery in Colorado. Therefore, Stanley "received" the materials within the common-sense understanding of the verb "to receive." Last, the court stated that the district court properly admitted the lay person's opinion. The court explained that the district court has broad discretion to determine whether a lay witness is qualified under Rule 701 to testify on a matter of opinion. Consequently, since the postal inspector's testimony was helpful to the jury in determining the age of the subjects and was useful as an explanation of why he ordered a supervised delivery, obtained a search warrant, and seized the defendant's package, the court held that the district court did not abuse its discretion in allowing the testimony.

United States v. Sullivan, 919 F.2d 1403

Author: Chief Judge Holloway

Dissent: Judge Tacha

Six defendants were convicted of various drug and other offenses, including conspiracy to manufacture, possession and distribution of amphetamine, and use of firearms in the commission of an offense. The defendants appealed, alleging that among many other claims: (1) the prosecutor repeatedly elicited evidence of uncharged crimes, wrongs or other acts in contravention of Fed. R. Evid. 403-04; (2) the government destroyed handwritten notes made during an agent's investigative interviews with three government informants; and (3) the district court improperly amended the indictment.

The Tenth Circuit reversed and remanded on the grounds that the repeated interjection of evidence about prior bad acts was clearly prejudicial. The court reasoned that the conspiracy's history is an insufficient basis for introducing evidence of prior wrongs. While a particular history of the conspiracy may be probative to establish identity, intent, motive, or plan, the prosecution made no effort to explain a probative purpose or connection to the earlier conduct and the case. Second, the court was unable to determine the merits of the claims concerning the handwritten notes destroyed by the government. The court explained that the district court did not conduct a hearing to determine whether the lost evidence would be material or if the government destroyed the evidence in bad faith. The court ruled that a hearing should be held, since either conclusion could be determinative of whether the government's failure to preserve evidence constituted a denial of due process. Third, the court found that the district court properly amended the indictment by deleting the firearms' objective. The court reasoned that

the objective could be severed from the indictment since it was unnecessary to the defendants' conviction on the conspiracy counts.

United States v. Teehee, 893 F.2d 271

Author: Judge Brorby

Defendant, Teehee, possessed, transferred, and sold long-distance telephone access codes, thereby providing him with unlimited access to U.S. Sprint telephone service. He was later convicted under 18 U.S.C. § 1029(a)(2) for trafficking in unauthorized access devices. The district court subsequently ordered him to pay \$100,000 in restitution. Teehee appealed, claiming that: (1) the restitution order was not made in accordance with the provisions of the Victim and Witness Protection Act of 1982 ("VWPA"), 18 U.S.C. §§ 3663-64; (2) the sentencing court failed to make sufficient findings under Fed. R. Crim. P. 32(a)(3)(D), ("Rule 32"); and (3) the restitution order was illegal because the total loss to U.S. Sprint could not be attributed directly to his activities.

The Tenth Circuit affirmed the order for restitution. The court ruled that the district court acted within its authority, which was granted by the VWPA. Second, the court dismissed Teehee's claim that the sentencing court failed to make sufficient findings under Rule 32. The court explained that the district court made proper findings as to the matter of restitution. Third, the court stated that although it was difficult to assign a precise amount to Teehee for loss caused by him, the determination was not impossible.

United States v. Tisdale, 921 F.2d 1095

Author: Judge Seth

Defendant, Tisdale, appealed his conviction for possession of firearms by a convicted felon. He also appealed his enhanced sentence. Specifically, Tisdale argued that: (1) the district court erred by denying his motion to suppress evidence discovered during a warrantless search of his trailer; (2) his sentence was improperly enhanced under the Sentencing Guidelines; and (3) his sentence was unlawful and unreasonable.

The Tenth Circuit affirmed Tisdale's conviction, but vacated the sentence and remanded for further consideration. The court found that the firearms were seized in a protective sweep and were within plain view. Accordingly, the search fell within the plain view exception to the search warrant requirement. Second, the court found that the enhanced sentence was appropriate. The court reasoned that burglarizing three establishments in one night amounted to three separate crimes, instead of one criminal episode as Tisdale argued. The court vacated the sentence, however, because the district court failed to determine Tisdale's offense level or criminal history category. Consequently, the court was left to speculate whether the Sentencing Guidelines were properly considered.

United States v. Tranakos, 911 F.2d 1422

Author: Judge Anderson

Defendants, Tranakos and Pilgrim, appealed their convictions for conspiring to defraud the United States and obstructing justice. Tranakos also appealed a conviction for preparing and presenting fraudulent tax returns. Specifically, Tranakos and Pilgrim contended that their convictions should be reversed because: (1) they were not supported by sufficient evidence; and (2) their statutory and constitutional rights to a speedy trial were violated. In addition, Tranakos argued that the conspiracy count should have been dismissed, and Pilgrim argued that the district court erred when it refused to sever the charge of obstructing grand jury testimony from the conspiracy count.

First, the Tenth Circuit held that the delay in bringing the defendants to trial did not violate either the sixth amendment or the Speedy Trial Act, 18 U.S.C. §§ 3161-74. Second, the convictions were supported by sufficient evidence. Third, the conspiracy count against Tranakos was proper. The court stated he assisted others in effectuating illegal tax strategies through the use of "sham transactions." Tranakos did not merely advocate a tax strategy of debatable legality. Fourth, Pilgrim's motion to sever the charge of obstructing grand jury testimony from the conspiracy count was properly denied. The court reasoned that the increase in judicial efficiency from joining the counts was significant enough to outweigh any prejudice.

United States v. Wach, 907 F.2d 1083

Author: Judge Baldock

Defendant, Wach, was sentenced to thirty months after being convicted of transporting a minor in interstate commerce with intent that she engage in prostitution and sexual activity. On appeal, Wach argued that the district court violated his due process rights by: (1) finding he did not accept responsibility for the crime; and (2) failing to append findings on controverted matters in the probation office's pre-sentence report which resulted in a prejudicial sentence. Plaintiff, United States, cross-appealed, arguing that the Tenth Circuit lacked jurisdiction to hear Wach's appeal of his sentence.

The Tenth Circuit first ruled that it did have jurisdiction over Wach's claim. The court reasoned that it has jurisdiction to review a final sentence when the grounds for review are violation of the law. Since Wach claimed that the district court violated his due process rights, he had a cognizable claim. Second, the court ruled that the district court was not clearly erroneous in relying on the probation office's finding that Wach failed to accept responsibility for the crime. The court reasoned that the district court gave Wach ample opportunity to prove he accepted responsibility. Moreover, a district court's determination that a defendant has not accepted responsibility must be given great deference on review. Last, the court found that the district court

did not rely on any controverted facts when determining Wach's sentence. The court explained that Wach's pre-sentence report contained various uncontroverted examples of antisocial conduct which justified his sentence. Thus, failure to append findings of controverted facts to the pre-sentence report was merely technical error. Consequently, the court remanded to the district court solely for the ministerial act of attaching the determination on controverted matters to the pre-sentence report.

United States v. Widdowson, 916 F.2d 587

Author: Judge Logan

Defendants, Widdowson, Bachman, and Whitely filed a motion to dismiss their indictments for distributing a controlled substance. They contended that: (1) delegating the power to temporarily schedule drugs to the Attorney General was unconstitutional; (2) the Attorney General did not subdelegate this scheduling decision to the Drug Enforcement Administration ("DEA"); and (3) if the Attorney General did subdelegate this decision, he lacked the power to do so. The district court granted the defendants' motion, and plaintiff, United States, appealed.

The Tenth Circuit held that delegating the power to temporarily schedule drugs to the Attorney General under 21 U.S.C. § 811(h), was unconstitutional. The court explained that such temporary power was unchecked by procedural safeguards or limitations. Second, it seemed extraordinary to assume that Congress intended to permit the temporary scheduling power to be delegated to a lesser administrator such as the head of the DEA. Last, the court ruled that Congress did not intend to permit subdelegation. The court again explained that there was a lack of procedural safeguards and limitations on the Attorney General's power.

United States v. Williams, 897 F.2d 1034

Author: Judge Anderson

Defendant, Williams, was convicted of engaging in racketeering activities and conspiracy to participate in such activities, conspiracy to distribute heroin, interstate travel to facilitate the conspiracy, and possession of heroin with intent to distribute. Williams was subsequently sentenced to fifty-five years in prison. She appealed both her conviction and sentence, contending that the district court erred by: (1) denying her motion to transfer venue; (2) denying her motion for severance; (3) refusing to suppress evidence gathered during a search based on an allegedly invalid search warrant; (4) determining her sentence by application of the Sentencing Guidelines; (5) increasing her sentence under the Guidelines for her role as a "leader or organizer" of the conspiracy; and (6) calculating the base offense level under the Guidelines based on the total quantity of drugs known to Williams to be involved in the conspiracy.

The Tenth Circuit affirmed the district court's rulings after finding Williams's claims to be meritless. First, the court stated that it would not reverse the district court's decision not to change venue to California because the circumstances surrounding the trial did not compel it. The court explained that most of the principal witnesses who appeared resided in or were located in Oklahoma. Furthermore, these considerations outweighed Williams's claim that minor witnesses were inhibited from appearing because of the trial's location. Second, the district court properly denied severance because Williams was not prejudiced by a joint trial. Williams's only claim of prejudice was that evidence adduced at trial against her co-defendant did not relate to her involvement in the conspiracy. The court ruled that, at most, this claim amounted to an allegation that her chances of acquittal were impaired. This is not sufficient to warrant severance. Third, evidence gathered during the search was properly admitted into evidence at trial. The court explained that the officers conducting the search were entitled to rely on the magistrate's decision that the facts were sufficient to establish probable cause. Moreover, the information used to establish probable cause was not too stale. The court reasoned that a sufficient likelihood continued to exist that evidence relating to the ongoing conspiracy would be found in Williams's home. Fourth, because Williams continued to be involved as a conspirator until December 1987, her offense was committed after the effective date of the Sentencing Guidelines. Thus, the district court properly applied the Guidelines to her sentence. Fifth, the district court's decision that Williams was an organizer was proper because the determination was not clearly erroneous. Finally, as a member of an ongoing conspiracy, Williams was subject to a sentence calculated on the actual quantity of drugs involved in the conspiracy, not just the amount she personally handled.